Healthcare Employees Union, Local 399, SEIU, AFL–CIO (City of Hope National Medical Center) ***and*** **Jennifer Brown, Barry Shafer, Ron Vandenbrink, Alice Knol, and Carla Dunham.** Case 21–CB–12840

May 15, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On February 16, 2001, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Healthcare Employees Union, Local 399, SEIU, AFL–CIO, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the Order.

Lisa E. McNeill, Esq., for the Acting General Counsel.
James G. Varga and *Monica T. Guizar, Esqs. (Van Bourg, Weinberg, Roger & Rosenfeld*), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Los Angeles, California, on December 18, 2000.[1] The charge was filed March 28 by individuals Jennifer Brown (Brown), Barry Shafer (Shafer), Ron Vandenbrink (Vandenbrink), Alice Knol (Knol), and Carla Dunham (Dunham). The complaint issued June 29 alleging that Healthcare Employees Union, Local 399, SEIU, AFL–CIO (Respondent or Union) violated Section 8(b)(1)(A) of the Act.

At issue is whether Jorge Rodriguez (Rodriguez), secretary-treasurer of Respondent, threatened employees of City of Hope National Medical Center (the Employer) in violation of Section 8(b)(1)(A) of the Act that Respondent would bargain with the Employer to have the work of the rehabilitation department contracted out or "outsourced."

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by all counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a California corporation, provides health care services at its facility in Duarte, California, where, during a representative 12-month period ending May 19, it derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of California. Respondent stipulated and I find the Employer to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Respondent's collective-bargaining relationship with the Employer covers employees in numerous classifications, including the rehabilitation department, and has been embodied in a series of collective-bargaining agreements, the penult of which was effective from February 16, 1999, through June 30. Negotiations for a succeeding contract began in May or early June (the 2000 negotiations).

As in prior negotiations, outsourcing was a significant issue in the 2000 negotiations. In prior years, the Employer had outsourced the housekeeping, environmental services, and dietary departments over Respondent's objections. Respondent had bargained over the impact of past outsourcing but was unable to prevent it. According to Fermin Cruz (Cruz), representation chairman and union steward, the fear of outsourcing was common among employees and a recurrent subject of discussion with the Union.[3] Rodriguez was aware that employees had a fear of being outsourced.[4] In the 2000 negotiations, Respondent renewed its proposed prohibition of Employer outsourcing.

In March, employees from the rehabilitation department initiated and circulated a union decertification petition. Although the decertification petition was filed with the Board, due to insufficient supporting signatures, no election was ever held.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] All dates are in 2000 unless otherwise indicated.

[2] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

[3] According to Shafer, employees of the rehabilitation department had no such fears, but Cruz testified that he believed all departments had concerns about outsourcing.

[4] Cruz testified that he had informed Rodriguez of employees' fears of being outsourced at least twice during the period of January to March 22.

Prior to commencement of negotiations, Respondent announced a "Contract Campaign Kick-Off All Day Meeting" to be held March 22 at the Employer's premises with three separate meeting times to accommodate employee schedules. The Charging Parties, all of whom are employed in the rehabilitation department, attended the meeting scheduled for 11 a.m. to 1 p.m. Among others, the following representatives of Respondent were present: Cruz, Rodriguez, and Caroline Esquivel (Esquivel), union steward.

Cruz spoke to employees about uniting for the upcoming negotiations. The Union showed a video of employees at Good Samaritan Hospital talking of the benefits they received from unionization. At the conclusion of the video, Esquivel said that before the group talked about negotiations, she thought the people behind the decertification petition should speak to that issue.

Employees and some of Respondent's representatives began speaking at once, saying that the petition was hurting negotiations, questioning why the petition supporters were circulating a petition at that particular time, and asking why they wanted to take away the Union. Some of the Charging Parties explained that under the law, it was the only period of time in which they could present a petition and that decertification was their only option if they did not want to be part of the Union. The interchange was heated. According to Cruz, there was a lot of frustration, emotions ran high, and voices were loud.[5]

Seven witnesses testified specifically concerning Rodriguez' allegedly threatening statement. Each account differs somewhat and is set forth below.

Brown testified that Rodriguez told her that she needed to stop the petition because it was divisive and would hurt negotiations, that it was a time for unity and not for separate hats to be worn. Brown replied that the decertification supporters did not want to take the Union away from anyone; they just wanted to have the right not to be in it. Rodriguez said, "You want out of the union, how about if we go to the bargaining table and have your department outsourced." Brown said that was illegal. Rodriguez did not respond.

Shafer testified that after the Charging Parties said they wanted out of the Union, Rodriguez said, "If you want out of the union, we'll just go to the bargaining table and have you outsourced." [6] Brown told Rodriguez that it would be an unfair practice, that he couldn't do that. Rodriguez made no response. Shafer also testified that one of the Charging Parties said that if there were a better way to get out of the Union, the rehabilitation employees would gladly take it and walk away. Rodriguez told them that if they worked for some other employer, they would not be bound by the contract.

Vandenbrink testified that Esquival suggested the rehabilitation employees just leave the Union and find another job. Rodriguez told her she could not say that. After further discussion, Rodriguez said, "If you want to be out of the union, why don't we go to the bargaining table and have rehab outsourced." Both Brown and Shafer said that would be illegal, that Rodriguez had to represent the rehabilitation employees in a fair way. Rodriguez did not answer.

Knol testified that Brown, Shafer, and Vandenbrink asked how the rehabilitation employees could get out of the Union. Rodriguez replied, "Well, if you want out of the union when we get to the bargaining table, we'll get your department outsourced." Brown told Rodriguez that would be illegal, as the rehabilitation employees were still paying dues, and the Union had to represent them fairly. Rodriguez made no reply.

Dunham testified that Rodriguez said, "Do you want to be outsourced" or "Do you want us to have you outsourced."

Cruz testified that he did not recall Rodriguez making any reference to outsourcing at the March 22 meeting. He recalled that Rodriguez repeatedly asked the rehabilitation employees what they wanted him to do about their desire to leave the Union, and that someone mentioned, "Well, do you want us to outsource or whatever, outsource your department?" Cruz was certain it was not Rodriguez who said it. Cruz testified that either he or Rodriguez might have said, "We're not here to outsource anybody in any department."[7]

Rodriguez testified that after the rehabilitation department employees repeatedly said they wanted out of the Union, the subject of outsourcing came up. Rodriguez was unsure who raised the subject, but he recalled saying, "Are you asking for us to put a proposal that you be outsourced?" According to Rodriguez, the rehabilitation employees said they did not want such a proposal, that the Union still had to represent them. Rodriguez did not otherwise comment on outsourcing.[8]

B. Analysis and Conclusions

The facts of this matter are very little in controversy. It is undisputed that prior to the March 22 meeting, the rehabilitation employees had initiated and circulated a decertification petition among unit employees. In doing so, they were engaged in protected activities under Section 7 of the Act.[9] Employees

[5] This account is based on an amalgam of testimony. It is generally consistent with all the testimony, depicts only the background events of the meeting, and does not impact specifically or implicitly on statements directly in issue. Unless specifically ascribed to one of Respondent's representatives, I do not consider Respondent to be responsible for or to have adopted any of the general comments.

[6] On cross-examination, Shafer phrased Rodriguez' statement as "How about we just outsource you and then you don't have to worry about it." On redirect examination, Shafer testified the statement was: "If you want out of the union, we can go to the bargaining table and have you outsourced." The substance of Shafer's testimony is consistent, and I don't find the minor variations to reflect negatively on his credibility.

[7] Cruz' testimony was often confused and sometimes vague. Moreover, it contradicts the testimony of Rodriguez as to the crucial statement. Where his testimony conflicts with that of the Charging Parties, I do not credit it.

[8] In response to a leading question by Respondent's counsel, Rodriguez agreed that his comment about outsourcing was rhetorical.

[9] Sec. 7 reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring

have the right under Section 7 to refrain from supporting a union, including engaging in decertification-related activities. *Transport Workers Local 525 (Johnson Controls)*, 326 NLRB 8 (1998); *Roofers Local 81 (Beck Roofing),* 294 NLRB 285 (1989), enfd. 915 F. 2d 508 (9th Cir. 1990).

In response to the rehabilitation employees pressing their wish to avoid inclusion in the bargaining unit, Rodriguez, an agent of Respondent, asked them if they wanted the Union to bargain to outsource their department at the 2000 negotiations. All witnesses except Cruz, whose testimony is not accepted, recalled Rodriguez asking whether the employees wanted the Union to bargain with the Employer to outsource the rehabilitation employees. Even Rodriguez admitted saying, "Are you asking for us to put a proposal that you be outsourced?" Regardless of the exact terminology, the clear thrust of the question was an expression of union willingness to propose and to bargain with the Employer to have the rehabilitation department outsourced. The issue is whether such a question constitutes a threat by Respondent violative of Section 8(b)(1)(A) of the Act. I find it does.

Respondent argues that Rodriguez' statement, in context, does not tend to coerce or intimidate the rehabilitation employees in the exercise of their protected rights. Respondent correctly notes that the test is whether the conduct complained of might reasonably tend to coerce or intimidate employees and that the surrounding circumstances must be considered. "The issue is whether objectively . . . remarks reasonably tended to interfere with the employee's right to engage in [a] protected act." *Southdown Care Center,* 308 NLRB 225, 227 (1992), supp. at 313 NLRB 1114 (1994). Subjective reactions of employees are not a determinative consideration, e.g., *Swift Textiles*, 242 NLRB 691 fn. 2 (1979). Respondent argues that inasmuch as the alleged threat was nothing more than a question posed during a union meeting, and inasmuch as the Union has always been adamantly against outsourcing, a reasonable employee would not have been threatened or intimidated in the exercise of protected rights. I cannot agree.

Rodriguez was aware that unit employees were concerned about their departments being outsourced. Indeed, in the recent past, outsourcing had occurred in several departments despite Respondent's efforts to prevent it. Fear of outsourcing was a recurrent topic in employee discussions with Respondent's representatives about the 2000 negotiations. Therefore, in spite of Respondent's professed opposition to outsourcing, any suggestion that Respondent would favorably view the outsourcing of a department would reasonably be expected to create fear of potential job loss.[10] Rodriguez' question was asked in a meeting where the discussion was admittedly heated, participants were upset, and the Union and other employees were united in expressing vociferous disapprobation of the decertification activity. While Respondent is correct in arguing that no explicit threat was made to the decertification supporters because of their activities, the Board does not require that threats be direct and unambiguous to be coercive. *Broadway Hospital, Inc.*, 244 NLRB 341 (1979). While Rodriguez' question may not have asserted an absolute intent to seek outsourcing of the rehabilitation department, at the very least it could reasonably be taken as a warning that, should the issue arise, the Union would be less than diligent in defending the job security of employees who had incurred its displeasure. Even assuming, as Respondent argues, the rehabilitation department employees did not believe the Union would carry out its suggestion, the threat is nonetheless coercive. As set forth above, subjective reactions of employees are not determinative of the coercive impact of statements. Moreover, rehabilitation employees were not the only employees present at the meeting. Employees who feared outsourcing might have been present or might have been expected to learn of the discussion. The question was an implied threat not just to the rehabilitation department employees but to any employee who engaged in protected, dissident activity.

Respondent contends that its later conduct in permitting Shafer, a rehabilitation department employee, to participate in the 2000 negotiations "created a safety net, such that no reasonable listener would consider Rodriguez' statement to outsource work a threat." Respondent also suggests that the Union's bargaining opposition to outsourcing further vitiated any coercive impact Rodriguez' statement may have had. These arguments are essentially that Respondent "cured" any coercive conduct. It is settled that under certain circumstances a party may avoid liability for unlawful conduct by repudiating the conduct. The repudiation must be timely, unambiguous, and specific in nature to the coercive conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Furthermore, there must be adequate publication of the repudiation to the employees involved. *Pope Maintenance Corp.,* 228 NLRB 326, 340 (1977), enfd. 573 F. 2d 898 (5th Cir. 1978). Here, no such repudiation was made. When Rodriguez asked if the rehabilitation employees wanted the Union to propose that their department be outsourced, Brown told him that such conduct was illegal.[11] If Rodriguez' question was merely "rhetorical" as he testified, he must at that point have realized that the rehabilitation employees did not view it the same way and, in fact, considered his statement to augur a violation of their rights. The time to explain, if an innocent explanation existed, was then. But Rodriguez neither explained nor denied any retributive intent on the part of the Union. Therefore, the statement was not repudiated and remained a threat reasonably calculated to coerce employees within the meaning of Section 8(b)(1)(A) of the Act.

While Respondent may discipline employees for circulating or supporting a decertification petition, it may not threaten to take any action to affect their employment except in cases of valid enforcement of a union-security provision. Threats "un-

membership in a labor organization as a condition of employment as authorized in section 8(a)(3) . . .

[10] Even assuming Shafer was correct in believing rehabilitation employees had no fear of outsourcing, there is no evidence that Rodriguez knew they felt secure in their jobs.

[11] Witnesses variously recalled that Brown said the conduct would be an unfair practice, or that Shafer also responded. Either response conveys the same meaning. Cruz testified that either he or Rodriguez might have said, "We're not here to outsource anybody in any department." No other witness recalled any such statement, and as I have not found Cruz to be a reliable witness, I find no such assurance was given.

justified under the provisions of Section 8(a)(3) and Section 8(b)(2) [are] coercive of [employees'] Section 7 right to refrain from supporting the Union, [and] . . . violate Section 8(b)(1)(A)." *Transport Workers Local 525 (Johnson Controls)*, supra. The Board has found "that Section 8(b)(1)(A)'s proper scope is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion . . . or otherwise impairs policies imbedded in the Act." *Sandia National Laboratories,* 331 NLRB No. 193, slip op. at 2). Here, Rodriguez' statement threatened interference with employees' employment relationship with the Employer and constituted a threat of loss of employment. Proscription of such conduct is "at the core of the adoption of Section 8(b)(1)(A)." Id at slip op. 7. Accordingly, I find that Respondent violated Section 8(b)(1(A) of the Act by threatening to bargain with the Employer to have the work of the rehabilitation department outsourced.

CONCLUSIONS OF LAW

By threatening to bargain with the Employer to have the work of the rehabilitation department outsourced, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Healthcare Employees Union, Local 399, SEIU, AFL–CIO, Los Angeles, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening to bargain with City of Hope National Medical Center to have the work of the rehabilitation or any other department subcontracted or outsourced because employees exercised their rights to initiate and/or sign or otherwise support a decertification petition.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its office in Los Angeles, California, and in its meeting halls copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 21 signed copies of the notices for posting by the Employer, City of Hope National Medical Center, if the Employer be willing, in places where notices to employees are customarily posted. Copies of the notice, to be furnished by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to bargain with City of Hope National Medical Center to have the work of the rehabilitation or any other department subcontracted or outsourced because employees exercised their rights to initiate and/or sign or otherwise support a decertification petition.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HEALTHCARE EMPLOYEES UNION, LOCAL 399, SEIU, AFL–CIO

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."